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In the Supreme Court of the United States

No. 353.

OCTOBER TERM, 1962.

TERESA GRISANTI, *etc.*,

Plaintiff-Appellant,

vs.

THE CITY OF CLEVELAND, *et al.*,

Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO AND FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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The Council's determination was not a matter of discretion but of fact-finding and is a proper subject of Judicial Review.

More than five years prior to the passage of Cleveland Ordinance No. 2428-60, creating Erieview I, the Council of the City of Cleveland enacted the Urban Renewal "Statute." This enactment, which is contained in Codified Ordinances of the City of Cleveland, Section 1.5102-1.5108, outlines the conditions necessary for a determination that an area is blighted. This enactment was indeed one of discretion which would not be subject to judicial review. It is such discretionary acts which are referred to in the various cases cited by Appellees. (Appellees' Motion to Dismiss, pp. 14-17.) *Village of South Euclid v. Bilkey*, 126 O. S. 505, concerned the fixing of compensation for village officers; *State, ex rel. Kittel v. Bigelow*, 138 O. S.

497, concerned the submission of a proposed charter amendment to the electorate; *Railroad Co. v. Defiance*, 52 O. S. 262, concerned the removal of a bridge at a railroad crossing; *Lent v. Tillson*, 140 U. S. 316, concerned the levying of assessments; *U. S. v. Carmack*, 329 U. S. 320, concerned the selection of a site for a Federal post office. *All* of these cases, cited by the appellees, concern legislative and administrative enactments based upon *discretion*. None of them is concerned with a pure finding of fact, using a prior "guiding" ordinance such as exists here. There is certainly good reason not to disturb discretionary legislative acts. But to say that a council's finding that black is white may not be reviewed is really to maintain that the people have no redress to the courts from any legislative abuse of discretion.

Conversely, appellees contend that the cases relied upon by appellant in her Jurisdictional Statement, such as *Mumpower v. Housing Authority of the City of Bristol*, 176 Va. 426, 11 S. E. (2) 732 and *Schenk v. City of Pittsburgh*, 364 Pa. 31, 70 A. 2nd 612, are irrelevant or distinguishable. (Appellees' Motion to Dismiss Appeal, pp. 17-18.) All of these cases are concerned with a review by various courts of legislative and administrative proceedings, which appellees contend is never done. And the contention that same are not cases of eminent domain does not alter this fact.

Appellees would contend that the only question raised by the appellant is the "wisdom" of Council in deciding that this area, known as Erieview I, was blighted. Such is *not* the fact. It is the appellant's contention that not "wisdom" but facts are at issue in deciding a question of blight and the City's findings are certainly reviewable by the courts. *Sargent v. City of Cincinnati*, 110 Ohio St. 444, 144 N. E. 132.

The Appellees never questioned the plaintiff's right to seek to enjoin the city's action as being a gross abuse of discretion. However, when the plaintiff attempted to prove that which she had alleged in her petition, appellees objected to the introduction of any evidence bearing upon the existence or non-existence of blight—even though this was the only way for plaintiff to prove the allegation raised in her petition.

If the Appellees are correct in their contention, it would appear to be the law that one may petition the court for redress of wrongs committed by legislative bodies through abuse of discretion, but, upon trial, may not introduce evidence to prove such allegations. It is not plaintiff's contention that a court may substitute its "wisdom" for that of a legislative body. Such has never been the law. But that the courts *do* have the right to review legislative decisions on questions of fraud, bad faith and abuse of discretion has certainly never been questioned before. *Bahr Corp. v. O'Brion*, 146 Conn. 237, 149 A. 2d 691 (1959). Although it is noted that in a recent Law Review article, one of appellees' counsel has apparently already disqualified "abuse of discretion" as a ground for judicial review of legislative proceedings. *Western Reserve Law Review*, Vol. 13, No. 4, September, 1962, Crawford, *Land Use Control*.

Appellees contend that there is a difference between a court's examination of a legislative determination in police power cases, and its examination of legislative action in the field of public improvements. This may be true if such legislative action does not at the same time deprive a private citizen of his right to own and use his property as he sees fit.

It seems almost inconceivable to hold that a citizen's private property may be declared "blighted" and taken

from him by a governmental agency without *any* opportunity for him to show that neither it nor its surrounding area is indeed blighted. This right is in no wise an attempt to usurp the powers of the legislature. It is rather the only defense available to the property owner when a legislative body thus abuses its discretion.

The case of *U. S. vs. Carmack*, 329 U. S. 230 (1946) reh. den. 329 U. S. 834 (1947), is cited by appellees as one which holds that the courts may not review legislative decisions. Such is *not* the fact. What the court said, as is quoted by appellees in their Motion to Dismiss at page 16, is that the finding of the District Court, that the selection of the park site "amounts in law to an arbitrary and unnecessary act," was a finding based on "comparative undesirability—and *not to have been a finding that the selection had been made without adequate determining principle and without reason.*" (Emphasis added.) The Court then went on to say that the matters of comparative desirability and necessity for the site were ones of administrative determination and not for judicial finding. If the court had felt that no review of administrative determination would ever lie, it would not have inserted the italicized language. The Court obviously meant, not that the courts could not review legislative and administrative determinations, but rather that they needed other grounds than "comparative undesirability" to sustain an injunction.

Evidence as to the truth or falsity of legislative findings may be received where plaintiff's petition alleges abuse of discretion.

In the instant case, the Cuyahoga County Court of Appeals held that the courts could review the action of legislative bodies where such bodies had abused their discretion. (Appendix to Jurisdictional Statement, p. 38a.) This Court then goes on to hold that because there was some evidence offered by the City that the council had *not* abused its discretion, that this was sufficient ground for denying to the plaintiff the right to introduce other evidence that the Council *had* abused its discretion. The court's position that courts generally have the right to review legislative acts where abuse of discretion is charged, but that no evidence to support this charge may be introduced by the plaintiff is surely a paradox. It would seem that the plaintiff in such an action could always present evidence to show that the legislative determination had no basis in fact. And such statement of law was made by the trial court herein. (Jurisdictional Appendix p. 19a.)

The questions involved are not of rules of evidence, but of the inviolability of private property.

The Appellees' contention that no Federal Question is presented is predicated upon the peculiar logic that having been deprived of her right to present evidence, the appellant is left only with an evidentiary question. In a recent U. S. Supreme Court case (*Mapp v. Ohio*, 367 U. S. 643) a different question of "evidence" was raised; that of whether or not a state officer may testify as to items found in the defendant's home where such officer had not first obtained a search warrant. The Federal question there was the defendant's rights as guaranteed by the

4th Amendment. Certainly no one was heard to say that the matter was merely one of proper or improper introduction of evidence and, therefore, not a federal question.

CONCLUSION.

The problem of urban renewal is one which faces all large municipalities today. It is a problem which is difficult of solution and baffling in its complexities. It is a problem which has instilled a great fear into the hearts of municipal fathers for the very survival of their cities. But it is in just such climates as this that the rights of the individual are very often lost.

Respectfully submitted,

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